Supreme Court, U.S.
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No. 10-524

In The
Supreme Court of the United States

RONALD D. MORGAN,
Petitioner,

v.

TOWN OF MINERAL VIRGINIA
Respondents.

On Writ Of Certiorari To The
Supreme Court of the United States

PETITION FOR REHEARING

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Bethesda, Maryland 20817
(240) 246-4070

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, petitioner Ronald D. Morgan respectfully petitions the Court for rehearing of its judgment and decision issued on December 23, 2010.

INTRODUCTION

The grounds for the Petition of Rehearing of Writ of Certiorari is that: (1) the Supreme Court of Virginia should have used their discretion in applying the Plain Error Standard in reinstating Petitioner's Appeal; (2) the decision of the trial court was not based on facts but on allegations and assumptions presented by Respondent as facts; (3) the ruling conflicts with the decisions of this Court and the Commonwealth of Virginia on the important Constitutional right of Due Process in the taking of property without compensation and the nuisance law of Virginia; and (5) the use of police power by

Responded was without authority under Virginia law.

By sustaining Respondent's Demurrer, the Court upheld his attempt to invoke legal principles that protect the Town's misconduct against legal liability despite the fact that immunity is waived for just compensation in the taking of property by the Fifth Amendment of the United States Constitution and in Article 1, Section 11 of the Virginia Constitution. In doing so, the Court has dismissed Petitioner's right to just compensation for the taking of property, has sustained the Respondent's violation of his constitutional rights, and has compromised Petitioner's right to legal recourse due to statute of limitations.

Rehearing is warranted in the interest of justice to sustain the principle that the rule of law must be based on facts and that constitutional rights

of due process and just compensation for the taking of property cannot be dismissed by Demurrer without factual evidence which is best served in a trail format with the right to question witnesses. The resolution of these unaddressed issues is important to the future lawful practice of this municipality and other local governments.

ARGUMENT

I. PLAIN ERROR STANDARD AND CLAIM PROCESSING

Among the factors that the Court has considered in determining whether to invoke the exception of plain error is "... a *pro se* litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised are all relevant considerations in this regard." *See generally* Id.; *Wirsching v. Colorado*,360 F.3d at 1197-98 (10th Cir.2004); *Theede v. United States Dep't of Labor,*

172 F.3d 1262, 1268 (10th Cir.1999). "If a plain error affects the integrity, fairness, or public reputation of judicial proceedings, it is in the discretion of the reviewing court to correct the error." *Johnson v. United States,* 520 U.S. at 467, 117 S.Ct. 1544 (1997)

Petitioner believes that he has exercised due diligence[1] in his effort to comply with the time limit and that vagueness and inequity of Rule § vscr-5:17 (a) (1), the unique and extraordinary unforeseen circumstances of record back to back record snow storms, and the importance of the constitutional issues of due process, the taking of property without compensation, and government abuse of authority fulfill the requirement of plain error and standards

---

[1] The diligence required for equitable tolling purposes is " 'reasonable diligence,' " see, *e.g., Lonchar,* 517 U. S., at 326, not " ' "maximum feasible diligence," ' " *Starns* v. *Andrews,* 524 F. 3d 612, 618 (CA5 2008) (quoting *Moore* v. *Knight,* 368 F. 3d 936, 940 (CA7 2004)). Holland v. Florida, No. 09-5327 (2010)

outlined by The United States Court of Appeals, Tenth Circuit, which would permit the discretionary reinstatement of Petitioner's Appeal.

This Court in *Kontrick v. Ryan*, 540 U. S., at 454-455 (2004) has distinguished between time limits on court rules for claim-processing and time limits on subject-matter jurisdiction.

> "[C]lassify[ing] time prescriptions, even rigid ones, under the heading subject matter jurisdiction'" can be confounding *Carlisle v. United States*, 517 U. S. at 434 (1996) (GINSBURG, J., concurring). Clarity would be facilitated if courts and litigants used the label" jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." See *Scarborough v. Principi*, 541 U. S. 401, 414 (2004); *Eberhart v. United States*, 546 U. S. 12, 17-18 (2005) *(per curiam)*; *Arbaugh v. Y & H Corp.*, 546 U. S. 500 (2006); *Bowles v. Russell*, No. 06-5306 (2007) (JUSTICE SOUTER et al Dissenting Opinion)

Virginia Supreme Court rule § vscr-5:17 (a) (1) should be considered to be claim-processing subject

to its time being modified by the discretion of the Court for equitable considerations and not mandatorily excluding discretion.

II. RESPONDENT'S ALLEGATION OF NUISANCE CONDITIONS IS NOT SUPPORTED BY FACT

Authority for Respondent's use of police power of government flows from the Commonwealth of Virginia.[2] The use of police power is restricted to certain situations involving health and safety. Along with this power come qualifiers that state when and how that power can be used.

Respondent cites a number of cases to justify the use of police power, and in given circumstances, how the liability for the use of police power is

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[2] Virginia Code § 15.2-1102. General grant of power; enumeration of powers not exclusive; limitations on exercise of power. Authorizes power "which is not expressly prohibited by the Constitution and the general laws of the Commonwealth..."

protected by sovereign immunity. This case is not one.

Codes cited by Respondent facilitate the abatement of nuisance but the authority to declare a nuisance in fact lies with the court under Title 48 – Nuisances of the Virginia Code. The State of Virginia does not confer that power on municipalities except in cases of imminent danger to the public of which this case was not one.

Before implementing the codes cited, the legal need for the use of police power must be established. The Commonwealth of Virginia has structured a procedural process consistent with due process requirements, by which nuisance conditions can be established in fact in Virginia Code, Title 48 – Nuisances. This code provides for an evidentiary hearing consistent with the Fifth and Fourteenth Amendments of the United States Constitution and

Article 1, Section 11 of the Virginia Constitution which prevents the taking of property without due process which this Court has determined requires an evidentiary hearing to establish nuisance in fact. It is not enough for Respondent to allege nuisance conditions; those conditions must be established in fact.

Without establishing a factual basis for nuisance, removal of property by Virginia law is unauthorized except in cases of imminent danger which was not the case with Petitioner's building.

Virginia code § 15.2-906, § 15.2-1115 and Mineral Town Ordinance § 5.4 give the Town authority to abate nuisance conditions caused by buildings. The language of Mineral Town Ordinance § 5.4 is essentially the same as Virginia code § 15.2-906 which states:

> 1. The owner of property therein, shall at such time or times as the governing body may

> prescribe, remove, repair **or** secure any building, wall, or any other structure that **might** endanger the public health or safety of other resident of such locality;
>
> 2. The locality through its own agents or employees may remove, repair or secure any building, wall or any other structure that might endanger the public health or safety of other residents of such locality, **if** the owner and lien holder of such property, after reasonable notice and a reasonable time to do so, **has failed** to remove, repair, or secure the building, wall or other structure. (Emphasis added)

The term "might" in both codes cited triggers the need for evidence to determine these conditions exist in fact. Once that need has been established, three options are given for compliance: "remove, secure **or** repair" depending on the condition of the building.

Virginia Code § 15.2-1115. Abatement or removal of nuisances states:

> A. "A municipal corporation may compel the abatement or removal of all **nuisances**..." (Emphasis added) "...**If** after such reasonable notice as the municipal corporation may

> prescribe **the owner** or owners, occupant or occupants of the property or premises affected by the provisions of this section **shall fail to abate or obviate the condition or nuisance**, the municipal corporation may do so..." (Emphasis added)

The trigger for the municipality to intercede is "if" the owner "has failed" to abate or obviate the health and safety requirements of the codes cited. Once these codes are invoked, the municipality has the ministerial obligation to inspect work done, to comply with the requirements of the codes cited, to determine if work required by code has abated or obviate unsafe conditions of the property and, if not, require additional work to satisfy any remaining concerns.

Compliance can only be determined by a qualified inspector and becomes a ministerial function of government to perform by requiring work to comply with codes. By failing to inspect the work performed by Petitioner, which significantly altered

the building,[3] Respondent had no factual basis for determining the condition of Petitioner's property and the assumption that the work was incomplete and insufficient and was not a justification for the use of police power to remove Petitioner's property. Respondent's argument based on the assumption of nuisance as sustained by the trial court is unjustified.

By implementing the codes cited, Respondent acted without authority since no nuisance was declared by the court and since authority for the removal of property cited in these codes is based on the abatement of "nuisance" conditions. Since no nuisance was declared in fact by the court, since Petitioner did work to abate alleged nuisance

---

[3] Petitioner's work included but not limited to the removal of the roof, ceiling, most of the interior walls, a third of the floor area, and work done to support the exterior walls were never acknowledged by the Respondent or considered by the trial court.

conditions, and since the Town failed to inspect the property following Petitioner's work, the Town had no basis in fact to proceed with the taking of Petitioner's property and is liable for that taking.

Despite this lack of authority, the trial court sustained Respondent's action which is a miscarriage of justice.

III. TOWN'S DECLARATION OF NUISANCE DID NOT JUSTIFY THE TAKING OF PROPERTY

The factual basis requiring implementation of these codes was based solely on the unnamed authority of their structural engineer whose report was never introduced as evidence nor did Petitioner have an opportunity to view or challenge the contents of that report prior to the demolition of his building. Because Respondent's expert was not named or identified, there is no way to tell if the person is actually an expert. Unless the person is

identified and has his expertise established, there is no reason for the trial court to have accepted the claim base on his report since that report was never introduced into evidence.

Respondent's structural engineer's report was based entirely on exterior observations because Petitioner's building was lock, windows boarded, enclosed by an eight foot fence. Any interior observations were based on supposition because he made no interior observations of the building, nor did he request access to the interior, and Respondent and the trial court accepted these unsubstantiated observations as fact without establishing the credibility of the report. Any comment made by their structural engineer concerning the building not based on direct observation is speculation and is not credible evidence to justify the removal of property.

By failing in their ministerial duty of inspection, the Town was factually unaware of the condition of the building when they crafted their Resolution, adopted July 10, 2006 which was not base on a factual representation of the building at that time. Respondent incorrectly mentioned "inspections" when the only inspection took place on December 20, 2005; relied on the report as fact; and speculated on building's further deterioration, unsubstantiated by fact, in order to commence with the demolition process. (Exhibit A)

Respondent exceeded their authority in declaring Petitioner's property a nuisance without facts by substituting their Resolution for the jurisdiction of the Court and initiated abatement proceedings before the property was declared a nuisance in fact, violating Virginia Code Section 48-Nuisances, and the Fifth and Fourteenth

Amendments of the United States Constitution and Section 11.1 of the Virginia Constitution which requires a due process evidentiary hearing before the taking of property.

IV. DISMISSAL OF PETITIONER'S COMPLAINT BY DEMURRER IN UNWARRENTED

A question of fact is a factual dispute between litigants that must be resolved by the jury at trial. It is an issue that is material to the outcome of the case and requires an interpretation of conflicting views on the factual circumstances surrounding the case. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy. Respondent's allegations as statements of fact are not trustworthy. For the trial court to sustain Respondent's allegations as fact is a miscarriage of justice.

In *Chappell v. McKune*, 132 F 3d 42, the Court stated that "dismissal of a *pro se* complaint is proper only where it is obvious that plaintiff cannot prevail on the facts he has alleged and it would be futile to allow him an opportunity to amend. See *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir.1997). Further, we liberally construe a pro se plaintiff's pleadings. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)" and in *Bonilla v Hurley*, 370 F 3d 494, that ...failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Petitioner ability to challenge Respondent's allegations were inhibited and/or curtailed by the format of the hearing of the Demurrer, with questions orchestrated by the trial court, which gave deference to Respondent in sustaining his

allegations as fact. In sustaining Respondent's Demurrer with prejudice and by dismissing the facts presented by Petitioner in his Complaint, the trial court has unfairly dismissed the merits of Petitioner's case by stating in effect that his Complaint could never be supported by law which is factually untrue.

V. PETITIONER WAS ENTITLED TO DUE PROCESS

Without first having had the property declared a public nuisance in fact before its demolition, as is required under Title 48 – Nuisances, Petitioner was denied an opportunity to confront the Town's allegations of nuisance as required under due process clause of the Fifth and Fourteenth Amendments of the United States and Section 11.1 of the Virginia Constitution.

Respondent alleges that dire conditions justified the removal of property without a hearing.

He quotes in his response to Petitioner's Appeal to the Virginia Supreme Court the following:

> "As the trial court noted in its ruling, the transcript of which is incorporated into the Final Order, (Appendix Exhibit D) when public safety is a issue, liberty or property interests can be deprived even without a prior hearing. Under the circumstances in dealing with a danger to the public, a locality can take action in advance of any hearing. As the trial court noted, any structure that might endanger the public health or safety or other `residents certainly sounds like a nuisance. `The statutory procedure order which the Town of Mineral proceeded satisfied the due process 'fairness' standard under McManama v. Plunk, 250 Va. 27, 34 (1995)."
>
> Finally, as the trial court noted, the statues at issue which provide for abatement of public nuisance are clearly within the legislature's police power. Commonwealth v. Croation Books, 228 Va. 383 (1984)."

Respondent's argument, sustained by the trial court, is the allegation that there was an imminent danger of harm to the community that required Respondent to take immediate action to remove the building in order to protect the public, precluding a

pre-deprivation hearing, is without merit.

Respondent offers no evidence to substantiate his claim, failed to inspect the property before crafting his Resolution on July 10, over seven months after their structural engineer's site visit; misrepresented the condition of the building which was significantly altered by Petitioner; and waited another three months before initiating the removal of the building. It strains credibility to think that an imminent danger existed during this time which could have been eliminated in one week by going to the court for emergency relief.

That the trial court would state "... any structure that might endanger the public health or safety or other residents certainly sounds like a nuisance" shows a bias in favor Respondent. That he would accept as fact unsubstantiated allegations and equate the language of codes as representative

of the condition of the building without proof reflects his predisposition to favor Respondents argument based on allegations, presumption, assumptions, supposition, and inaccurate statements couched as evidence but unsubstantiated by fact.

VI. PETITIONER IS ENTITLED TO JUST COMPENSATION FOR THE TAKING OF PROPERTY

Petitioner's Complaint for Compensation, has argued for compensation for property taken by the Town in its unauthorized demolition of Petitioner's Auditorium Building, the removal of personal property within and outside that building, and the performance of additional work unrelated to abatement action involving alleged health and safety issues

While sovereign immunity is often available to protect a government agency from suit or liability, federal and state constitutions provide a waiver of

immunity where there is a "taking" of property, "damage" to property, or both.

The Fifth Amendment of the United States Constitution provides for just compensation as stated:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.** (Emphasis added)

The Virginia Constitution, Article 1, Section 11 also provides for just compensation:

> That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, **nor any law whereby private property shall be taken or damaged for public**

> **uses, without just compensation**....
> (Emphasis added)

Neither Constitution qualifies the right to just compensation based on sovereign immunity and does not support Respondent's argument in his Demurrer that he was not liable based on sovereign immunity which the trial court sustained.

Without having had Petitioner's property declared a nuisance in fact by the court, the Town cannot claim to be exempt from the consequences of compensating Petitioner for the taking property his property as required under the Fifth Amendment of the U.S. Constitution and Section 11.1 of the Constitution of Virginia and Those expenses incurred by the Town's unauthorized action should be borne by the Town, not the Petitioner, and their lien against his property for those expenses should be removed.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this Court to grant his Petition for Rehearing.

January 7, 2011

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Ronald D. Morgan, *Petitioner*

CERTIFICATE OF SERVICE

I, Ronald D. Morgan, do swear or declare that on this date, January 7, 2011, as required by Supreme Court Rule 29. I have served the enclosed PETITION FOR REHEARING on counsel to the above proceeding by United States Priority Mail prepaid. His address is as follows:

Richard H. Milnor, Esq.
Zunka, Milnor, Carter & Inigo, LTD
414 Park Street
P.O. Box 1567
Charlottesville, VA 22902

Ronald D. Morgan, *Petitioner*

APPENDIX

EXHIBIT A

RESOLUTION
REGARDING OLD MINERAL ELEMENTARY SCHOOL

WHEREAS the old Mineral Elementary School buildings have been long abandoned as a school; and

WHEREAS the said buildings have been allowed to fall into an advanced state of disrepair and decay; and

WHEREAS the said buildings are located immediately adjacent to a busy public highway, to a recreational facility for children and to a residential neighborhood; and

WHEREAS the Council of the Town of Mineral has caused the said buildings to be examined by qualified inspectors and is informed that the same are in danger of collapse; and

WHEREAS it appears that the Auditorium building of the said School is in a more advanced state of disrepair and must be secured without delay, in the interest of the public safety; and

WHEREAS the Council has the power and the duty to secure the same in accordance with Section 5-4 of the Town Code and with Sections 15.2-906 and 15.2-1115 of the Code of Virginia;

NOW THEREFORE BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF MINERAL as follows:

1. That the Council finds (a) that the Auditorium building of the old Mineral Elementary School is an unsafe, dangerous building which constitutes a menace to the health and safety of the public and which might endanger the public health or safety of other residents of the Town; and (b) that the owner of such property after reasonable notice and a reasonable time to do so has failed to remove, repair or secure said building; and
2. That the Town Manager be, and he is hereby, directed to cause the said building to be removed, repaired and secured, by agents or employees of the Town, first giving notice to the owner of the said building in accordance with the provisions of Town Code Section 5-4 and Virginia Code Section 15.2-906; and
3. That, in so doing, the Town Manager be, and he is hereby authorized and directed to procure proposals for the said work and to report back to Council upon such proposals, and to take such other actions as may be necessary to carry out these directives.

Adopted this 10th day of July, 2006.

A true copy, teste: _____, Clerk of Council